1669.

SUPREME COURT OF THE UNITED STATES.

No. 180.

THE GENERAL MUTUAL INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

EBENEZER SHERWOOD.

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Gideon, Printer.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the judges of the circut court of the United States, for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Ebenezer B. Sherwood and the General Mutual Insurance Company, a manifest error hath happened, to the great damage of the said the General Mutual Insurance Company as is said, and as appears by their complaint: we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this ninth day of June, in the year of our Lord one thousand eight hundred and forty-nine, and of the independence of the United States the seventy-third.

ALEXANDER GARDINER,
Clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit.

The answer of the judges of the circuit court of the United States, for the southern district of New York, in the second circuit, in the within writ mentioned:

The record and proceedings, whereof mention is within made, with all things concerning the same, are hereby respectfully sent to the Supreme Court of the United States within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this twenty-eight day of
[SEAL.] November, in the year of our Lord one thousand eight hundred and fifty-one.

JOHN W. NELSON, *Clerk.*

By the honorable Samuel R. Betts, one of the judges of the circuit

court of the United States, for the southern district of New York, in the second circuit.

To Ebenezer B. Sherwood.

Whereas, the General Mutual Insurance Company lately issued out of the Supreme Court of the United States a writ of error, directed to the judge of the circuit court of the United States, for the southern district of New York, in the second circuit, stating that, in the record and proceedings, as also in the rendition of the judgment of a plea in the said court, before the judge thereof, between Ebenezer B. Sherwood and the General Mutual Insurance Company, a manifest error hath happened, to the great damage of the said the General Mutual Insurance Company; and whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, to be held at the Capitol, at the city of Washington, on the first Monday of December next, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the ninth day of June, in the year of our Lord one thousand eight hundred and forty-nine, and of the independence of the United States the seventy-third.

SAMUEL R. BETTS.

Service of a copy of the within is hereby admitted, dated June 9, 1849.

E. H. OWEN,
For E. B. SHERWOOD.

U. S. CIRCUIT COURT.

Pleas before the judges of the circuit [court] of the United States, for the southern district of New York, in the second circuit, at the City Hall in the city of New York, in the said southern district of New York, of the 23d day of August, in vacation as yet of April term, in the year one thousand eight hundred and forty-seven.

Witness Roger B. Taney, esquire, chief justice of the Supreme Court of the United States. ALEXANDER GARDINER, *Clerk.*

SOUTERN DISTRICT OF NEW YORK, *ss.*

Ebenezer B. Sherwood, a citizen of the State of Connecticut, plaintiff, puts in his place E. H. Owen, his attorney, against the General Mutual Insurance Company, a corporation, &c., of the State of New York, defendant, in a plea of trespass on the case upon promises.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Be it remembered, that on the twenty-third day of August, as yet of April term, in the year one thousand eight hundred and forty-seven, before the judges of the said circuit court of the United States, at the City Hall in the city of New York, in said southern district of New York, came Ebenezer B. Sherwood, a citizen of the State of Connecticut,

plaintiff, by Edward H. Owen, his attorney, and brought into the said court then there his certain writ against the General Mutual Insurance Company, a corporation doing business in, and being a citizen, person, and inhabitant of the State of New York, and duly created by a law of the said State, defendant of a plea of trespass on the case upon promises, which said writ follows in these words to wit:

SOUTHERN DISTRICT OF NEW YORK, *ss*.

The General Mutual Insurance Company, a corporation created by an act of the legislature of the State of New York, and being a person and inhabitant of the said State, transacting and carrying on its business in the city of New York, defendant in this suit, was summoned to answer Ebenezer B. Sherwood, a citizen of the State of Connecticut, plaintiff therein, of a plea of trespass on the case upon promises, and thereupon the plaintiff, by Edward H. Owen, his attorney, complains:

For that, whereas heretofore, to wit, on the seventeenth day of October, in the year one thousand eight hundred and forty-three, at New York aforesaid, the defendant, for and in consideration of a premium of four hundred and eighty dollars to it paid, did make and deliver to the plaintiff a policy of insurance subscribed by it for the sum of eight thousand dollars, whereby it insured the plaintiff to the amount aforesaid, on account of whom it might concern, loss payable to him upon the body, tackle, &c., of the brig Emily, lost or not lost, at and from the seventeenth day of October, one thousand eight hundred and forty-three, at noon, until the seventeenth day of October one thousand eight hundred and forty-four, at noon; if then absent, liberty to renew for three months at pro rata premium, each passage subject to its own average. And the said vessel was warranted by the assured not to use any foreign port in the Gulf of Mexico, nor St. John river in Florida, nor the West Indies, between the twenty-fifth day of July and the fifth of October; the said vessel, tackle, &c., were valued at sixteen thousand dollars, without any further account to be given by the assured to the assurers or any of them for the same, touching the adventures and perils, which the defendant was contented to bear and took upon itself during the said term; they were of the seas, men of war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, or people of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said vessel or any part thereof; and in case of any loss or misfortune it should be lawful and necessary to and for the assured factors, servants, and assigns, to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the said vessel or any part thereof, without prejudice to that insurance, to the charges whereof the said insurance company would contribute according to the rate and quantity of the sum therein insured; and in case of loss said loss to be paid in thirty days after proof of loss, and proof of interest in the said, whom

it may concern, (the amount of the note given for the premium, if unpaid, being first deducted,) but no partial loss or particular average should in any case be paid, unless amounting to five per cent., as by the said policy of insurance will, amongst other things, more fully appear, and to which the plaintiff prays leave to refer.

And the plaintiff further in fact saith, that the said policy of insurance was effected for the use and benefit of Frederick Sherwood to the extent of six thousand dollars, part and parcel of the said sum of $8000, so subscribed as aforesaid, and for the use and benefit of Abraham Sherwood to the extent of $2000, residue of the said sum of $8000; which said Frederick Sherwood and Abraham Sherwood were and still are citizens of the State of Connecticut, and which said policy was effected in order to protect their respective shares and interests in the said brig; and he avers that at the time of effecting the said policy, and continually afterwards, until and at the time of the loss and misfortune hereinafter mentioned, he, the said Frederick Sherwood, was interested in and the owner of three-quarter parts of the said brig, her tackle, apparel, &c., and the said Abraham Sherwood was interested in and the owner of one other eighth part of the said brig, her tackle, &c., of which the defendant had notice, to wit, at the city of New York aforesaid.

And the said plaintiff further saith that the said brig did not use any foreign port in the Gulf of Mexico, nor St. John's river, in Florida, nor the West Indies, between the twenty-fifth July and the fifth October, within the true intent and meaning of the said policy. He further in fact saith, that afterwards, to wit, on the thirteenth day of March, in the year one thousand eight hundred and forty-four, the said brig set sail and departed from Charleston, in the State of South Carolina, having on board a cargo of furs, corn, tobacco, cotton, rice, &c., bound for the port of New York, and that at the time of sailing from Charleston as aforesaid the said brig was stout, staunch, and strong; had her cargo well and sufficiently stowed and secured, and was in good and proper sailing trim; was well masted, rigged, tackled, victualled, apparelled, and appointed; had on board a skilful and experienced master, skilful and experienced mates, and sufficient and competent mariners, and was in every respect fit for sea and the voyage she was about to undertake.

And the plaintiff further in fact saith, that nothing material occurred on the said voyage until Tuesday, the nineteenth day of March aforesaid, (sea time,) which commenced with strong breezes and clear weather; at quarter past one o'clock, p. m., Barnegat light bore west about three miles; at two, p. m., took in the studding sails and top gallant sails, and close reefed the fore topsail, and double reefed the main topsail and hauled up the foresail; a heavy snow squall coming on, the wind which before had been from south by west, hauled and came out from west northwest, and from thence to about northwest by west, being variable and squally; at four o'clock, p. m., they set the jib and double reefed the fore topsail and trysail; at forty minutes past five

o'clock, p. m., a duly licensed pilot, appointed by the authorities of the State of New Jersey, for that purpose duly empowered and authorized by the laws of the said State, came on board the said brig, and as such pilot took the charge, command, and management thereof, and undertook to pilot and navigate the said brig into the port of New York. And the said plaintiff further saith, that by the orders of the said pilot they set the main sail and jib, single reefed fore topsail and whole main topsail, the said brig heading up about north and north by east, the wind heading them occasionally, that they stood on that course until the said pilot judged the brig to be up to the point of the Romer shoal, having before this taken in the mainsail and jib; that by orders of the pilot they tacked ship and stood in for the point of the Hook, heading to the southward and westward close hauled; that between the *the* hours of seven and eight o'clock in the evening or night of the last mentioned day, the pilot ordered the brig to be put about; that an attempt was made to put the brig about, but she misstayed, whereupon the pilot gave orders to wear ship; and the plaintiff further saith, that whilst the said brig Emily was being navigated as aforesaid, on the high seas, to wit, at the city of New York, by and through the want of a proper look-out by the mate of the said brig, and by and through the erroneous order of the chief mate, who was stationed on the top gallant forecastle of the said brig, who saw the schooner hereinafter named, and who cried out to the man at the wheel, "helm hard down! luff!!" whereas he ought not to have given the said order, and by and through the negligence or fault of the said brig Emily, the said brig, on the high seas, ran into or against a schooner or vessel called the Virginian, and thereby damaged and injured the said schooner so that she then and there foundered and sunk, and was totally lost, together with a valuable cargo laden in and on board of the said schooner; and the said brig Emily, her tackle, &c., by the force of the said collision, became and was greatly damaged, to wit, to the value and amount of $300, to wit, on the same day and year, and at the place last aforesaid, whereby the owners of the said brig became and were obliged to, and necessarily did, expend a large sum, to wit, the sum of three hundred dollars, in and about the repairs of the said brig Emily; and the said last mentioned vessel also then and there became and was liable to make good and pay to the owners of the said schooner and of the said cargo laden in and on board of her, the damages sustained by them respectively by the said collision, which liability the said plaintiff avers then and there constituted, and was, a lien and specific charge and encumbrance upon the said brig Emily, her tackle, apparel, and furniture; of all which premises the said defendants had notice, to wit, on the same day and year last aforesaid, and at the city of New York aforesaid.

And the said plaintiff further in fact saith, that afterwards, to wit, on the twenty-sixth day of March, in the year last aforesaid, (1844,) Benjamin W. Bedell, Elisha Bedell, and William Van Name, did file their libel and complaint in the district court of the United States, for

the southern district of New York, (the said court then and there having jurisdiction of the said libel and premises,) against the said brig Emily, her tackle, apparel, and furniture, in a cause of collision, civil and maritime, setting forth therein, amongst other things in substance, that they were the owners of the said schooner Virginian, and that on the day and year aforesaid, the said brig Emily with great force, ran foul of and against the said schooner Virginian, and sunk her with her tackle, apparel, and furniture, and cargo, whereby she became totally lost to the libellants, together with the profits, freight, and emoluments of the said voyage, and averring that they had sustained damages by the said collision to the amount of five thousand dollars and upwards, and alleging therein that the said brig Emily, her tackle, and apparel, were liable in rem for the said damage, and praying process of attachment against the said brig Emily, her tackle, apparel, and furniture, according to the course of admiralty courts, and that she might be condemned and sold to pay the amount of the libellants' said damages, and for such other and further relief in the premises as to justice should seem meet; and also to condemn the said brig or vessel, her tackle, apparel, and furniture, and all persons intervening, for their interest in the said brig in costs, as by the said libel, or a certified copy thereof, will more fully and at large appear, and to which the plaintiff refers.

And the said plaintiff further in fact saith, that upon filing the said libel process of attachment was duly issued out of and under the seal of the said district court, according to its course and practice, and delivered to the marshal of the said southern district of New York, who, by virtue thereof, did attach and keep the said brig Emily, according to the exigency of the said writ; and the plaintiff further in fact saith, that the owners of the said brig, to wit, the plaintiff and the said who were severally interested in, and each the owner of one quarter of the said brig, and Frederick Sherwood and Abraham Sherwood, who were severally interested in and the owners of the other half part of said brig, her tackle, &c., afterwards, to wit, on the nineteenth day of April, in the year one thousand eight hundred and forty-four, did sue, labor, and travel for, in, and about the defence, safeguard, and recovery of the said brig, and did appear before the said court, and file their claim to the said brig, and their answer to the said libel and complaint, and did deny that the said collision was occasioned by the want of care or skill on the part of the master, or any of the crew of the said brig; and they, in and by their said answer, did submit to the said court, and insist, that the said brig was not liable to pay the damages alleged by the libellants to have been sustained by them, and did deny that the libellants were entitled to the remedy and relief prayed by them as aforesaid; whereupon they prayed that the said court would be pleased to pronounce against the libel aforesaid, and to condemn the libellants in costs, and otherwise right and justice to administer in the premises, as by the said claim and answer now on file in the said court, or by a certified copy thereof, will more fully appear.

And the said plaintiff further in fact saith, that notice of the pendency of the said action, and of the said proceedings, was given to the defendant, that it might unite in the defence of the same, or that it might take such measures in relation to the matter as it might be advised was necessary or proper; and the plaintiff further saith, that afterwards, to wit, on the first day of October, in the year last aforesaid, the said action was brought to a hearing before the honorable Samuel R. Betts, district judge of the United States, for the southern district of New York aforesaid, and witnesses were then and there examined on the said first, second, tenth, seventeenth, and twenty-eighth days of October last aforesaid, as well on the part of the libellants as *well* on the part of the respondents; and the said cause was thereupon afterwards, to wit, on the 11th and 12th days of March, 1845, argued before the said district judge in the said district court, upon the pleadings and proofs, and argued by the counsel for the libellants and for the respondents respectively; and thereupon, afterwards, to wit, at a special term of the said court, held at the City Hall, in the city of New York, on the twenty-second day of April, in the year one thousand eight hundred and forty-five, the said Samuel R. Betts did then and there pronounce and deliver his opinion to be, upon the said pleadings and proofs, and the said court did accordingly declare, amongst other things, in substance, that the brig Emily was to leeward of the Virginian when the latter was first seen; that no sufficient and proper look out was kept on board her at the time; that the intermission for the moment of that precautionary vigilance on board the Emily might very naturally spring out of a confusion likely to arise from the failure of the vessel to come round to the wind; her dangerous proximity to the shore; the entanglement of some of the running rigging, which impeded her manœuvre, and the distraction these circumstances are calculated to produce in the attention of the mate, who at the moment appeared to have been the only one acting as look-out forward, but that the said circumstances did not relieve the vessel from the obligation to maintain these precautions, or from the consequences of the omission to do so; and the said judge did then accordingly pronounce his decree, which was thereupon entered accordingly in the said cause; whereby, after reciting that the said cause had been heard upon the pleadings and proofs, and argued by counsel on behalf of the libellants, and on the part of the claimants, and due deliberation being had in the premises, and it appearing to the court that the collision in the pleadings mentioned, and the damages and loss incurred by the libellants in consequence thereof, occurred by the negligence or fault of the said brig, it was considered that the libellants were entitled to recover their damages by them sustained thereby; therefore it was ordered, that it be referred to the clerk of the court to ascertain and report to the court the value of the schooner Virginian, her tackle, apparel, and furniture at the time of the said collision, and of the cargo then on board of her belonging to the libellants, and the amount of the loss in the premises sustained by the libellants by means of said collision; and that on the

coming in and confirmation of said report, a decree be entered therefor in behalf of the libellants, and for their costs to be taxed, as by the said decree will more fully and certainly appear; of which decree the defendant then and there, to wit, on the same day and year, and at the city aforesaid, had notice.

And the plaintiff further in fact saith, that in pursuance of the said decretal order, the said clerk proceeded with the said reference, and was attended by the proctors of the libellants and the claimants, and testimony was offered and given before the said clerk by the said parties respectively, touching the matters referred to him as aforesaid; and thereupon afterwards, to wit, on or about the twelfth day of May, in the year one thousand eight hundred and forty-five, the said clerk did make his report to the said court, wherein and whereby, after reciting in substance that, in pursuance of a decretal order made in the said cause, by which, among other things, it was referred to the clerk of the said court to ascertain and report to the court the value of the schooner Virginian, her tackle, apparel, and furniture, at the time of the collision, and of the cargo then on board of her belonging to the libellants, and the amount of the loss in the premises sustained by the libellants by means of such collision, and to report the same to the court with all convenient speed, he, James W. Metcalf, clerk of the said court, did thereby report, that he had been attended by the proctors of the several parties, and had examined the testimony offered by them respectively, and did find that the value of the schooner Virginian, at the time of the collision, was five thousand dollars, and her situation in the line of packets with which she was connected gave her an additional value of five hundred dollars. And he did further report that there was no cargo on board belonging to the libellants; but the freight bills of the cargo on board amounted to two hundred and fifty-four dollars and ninety cents, which, with three hundred dollars in money on board belonging to the libellants, increased the amount of the loss sustained by the libellants by means of said collision five hundred and fifty-four dollars and ninety cents, making the whole loss sustained by the libellants the sum of six thousand and fifty-four dollars and ninety cents, as by the said report, or a certified copy thereof, will more certainly appear.

And the plaintiff further in fact saith, that the claimants did thereupon, and on the same day and year last aforesaid, duly except to the report of the said clerk, and did file their exceptions thereto according to the course and practice of the said court, to the effect following, that is to say:

1st. To so much of said report as found that the value of the schooner Virginian, at the time of the collision, was five thousand dollars.

2d. To so much of said report as found that her situation in the line of packets with which she was connected gave her an additional value of five hundred dollars.

3d. To so much of said report as found that the freight bills of the

cargo on board amounted to two hundred and fifty-four dollars and ninety cents.

4th. To so much of the said report as found that there were three hundred dollars in money on board of said vessel belonging to the libellants.

5th. To so much of the said report as found that the said freight bills and three hundred dollars in money increased the amount of the loss sustained by the libellants, by means of said collision, the sum of five hundred and fifty-four dollars and ninety cents.

6th. And said claimants excepted to said report because it reported in favor of the libellants more than the sum of five thousand dollars, the amount claimed by them in the libel filed in the said cause; as by the said exceptions, or to a certified copy thereof, will more fully and certainly appear.

And the said plaintiff further in fact saith, that afterwards, at a special term of the said district court of the United States for the southern district of New York, held at the City Hall, in the city of New York, on Saturday, the third day of June, in the year 1845, the said cause was brought to a hearing before the said the honorable Samuel R. Betts, district judge as aforesaid, upon the said exceptions, filed to the aforesaid report of the clerk, and the proofs and allegations of the respective parties; and the arguments of the proctors having been heard, and due deliberation being had in the premises, afterwards, to wit, on the seventh day of June aforesaid, it was then and there considered by the said court, that the exceptions No. 2, 4, and 5, filed in the said cause, be allowed, and that exceptions No. 1, 3, and 6 be disallowed.

It was then and there further considered by the court that the libellants recover the sum of five thousand two hundred and fifty-four dollars and ninety cents, being the amount ascertained by the said report on the allowance and disallowance of the exceptions as aforesaid.

It was further ordered that no costs be allowed either party as against the other on the exceptions in the said cause. Whereupon it was ordered, adjudged, and decreed by the court then there, that the libellants recover in that action their damages by means of the premises, the sum of five thousand two hundred and fifty dollars and ninety cents, together with their costs to be taxed, and that the said brig, her tackle and apparel, be condemned for satisfaction thereof, as by the said decree, or a certified copy thereof, will more certainly appear.

And the said plaintiff further saith, that afterwards, to wit, on the twenty-fifth day of June aforesaid, the costs of the libellants were duly taxed at seven hundred and four dollars and ninety cents; of which the defendant had notice, to wit, on the same day and year last aforesaid, and at the city aforesaid.

And the said plaintiff further in fact saith, that, upon the rendition of the last mentioned decree, the aforesaid claimants did thereupon, afterwards, to wit, on the third day of July, one thousand eight hundred and forty-five, appeal from the said decree to the circuit court of the United States, for the southern district of New York, in the second

circuit, according to the course and practice of the said court, and they prayed that the said decree might be annulled and reversed, and held for naught, or that such other decree thereupon might be made as to the said circuit court should seem just, and that the said libel might be dismissed, and the said respondents decreed to pay to the appellants their costs to be taxed, and otherwise, as to the said court should seem meet and proper. Of all which proceedings the said defendant had notice; and the said defendant also had notice that, if the defendant wished that the said appeal should be prosecuted or preferred, *that* it should be dismissed, or had any other directions to give in the premises, the owners of the said brig Emily would follow its instructions, to wit, on the same day and year last aforesaid, and at the place aforesaid.

And the said plaintiff further, in fact, saith, that afterwards, to wit, on the second day of November, in the year one thousand eight hundred and forty-six, the said cause was brought to a hearing before the honorable Samuel Nelson, circuit judge of the United States for the southern district of New York, in the second circuit, upon pleadings and proofs; and the counsel for the respective parties having been heard on the said second, and also on the third, fourth, fifth, sixth, and seventh days of November aforesaid, the said circuit court did afterwards, to wit, on the sixth day of April, in the year one thousand eight hundred and forty-seven, deliver its opinion in the said cause, and find upon the said proofs, in substance, that the schooner Virginian was not in fault; that the mistaken order of the mate of the said brig to the man at the wheel, in connexion with the derangement of the running rigging of the vessel, and confusion on board at the time among the hands from her misstaying a few minutes before, led to a change of course on the part of the said brig, and consequent collision. And the said court did further deliver its opinion, and find upon the said proofs, in substance, that the hands on board the Emily failed to keep a proper look-out; and that the said brig might have avoided the collision with the use of proper caution, skill, and vigilance; and thereupon the said court did order, adjudge, and decree, that the aforesaid final decree of the district court be, and the same was thereby in all things, affirmed with interest from the date of the said decree, and costs to be taxed, as by the said last mentioned decree will appear, and to which the plaintiff refers; and notice of the said last mentioned decree was then and there, to wit, on the same day and year last aforesaid, and at the city aforesaid, given to the defendant.

And the plaintiff further, in fact, saith, that the said Frederick Sherwood and the said Abraham Sherwood were then and there, to wit, on the —— day of April, in the year last aforesaid, respectively obliged to pay, and did pay, severally, their share and proportion of the amount of the said decree, and interest thereon, to wit, the sum of six thousand dollars, in proportion to their respective interests in the said brig, in order to discharge and relieve the said brig of and from the said lien occasioned by the said collision, and to satisfy the said decrees; of all

which the defendant then and there had notice, to wit, on the day and year last aforesaid, and at the city aforesaid.

And the said plaintiff further, in fact, saith, that one Thomas J. Austin, as well on his individual account, as also as administrator, &c., of Gustavus Austin, junior, heretofore, to wit, on the third day of May, in the year last aforesaid, also filed his libel against the said brig Emily, her tackle, &c., alleging and propounding that the said brig, her tackle, &c., were liable in rem for the value of a quantity of furs that were laden in and on board the Virginian at the time of the said collision, and which were thereby totally destroyed and lost, and claiming damages therefor to the amount of three thousand dollars, and praying that the said brig might be condemned therefor. And the said plaintiff further saith, that, after the decisions and decrees of the said courts in the premises, and satisfactory proof being made to him of the interest of the said Thomas J. Austin in the said furs, and that they were totally destroyed and lost by the said collision, the said Frederick Sherwood and Abraham Sherwood did, then and there, respectively pay unto the the said Austin the sum of three hundred dollars in compromise and full settlement of the said damages, and in discharge and release of the said brig, her tackle, &c.; of which the defendant had notice. And he further saith, that the said Frederick Sherwood and the said Abraham Sherwood were severally obliged to pay to divers other owners of the cargo laden on board of the said schooner at the time of the collision, and which were totally lost thereby, other large sums of money, in order to discharge and satisfy other liens and charges therefor on the said brig; that is to say, to the Atlantic Mutual Insurance Company, for three thousand nine hundred and fifty bushels of corn, laden on board of the said schooner, and which were destroyed and lost by the said collision, the sum of one thousand nine hundred and eighty dollars, with interest from the 26th March, 1844; to Hobson Johns, the sum of three hundred and fifty dollars by way of compromise, and in full settlement for one hundred and thirty-two boxes of tobacco, which were on board of the said schooner, and were destroyed and lost by the said collision; to Henry Raymond, the sum of fifty dollars, in settlement and satisfaction of a claim and lien on and against the said brig for an invoice of fur belonging to him, and which was destroyed on board of the said schooner by reason of the said collision; to William D. Roberts, jr., the sum of one hundred and twenty-five dollars by way of compromise, and in full settlement for a lot of copper, pewter, and composition which was on board of the said schooner, and was destroyed and lost by reason of the said collision. And the said plaintiff further saith, that the said Frederick Sherwood and the said Abraham Sherwood, by reason of the said collision, and by the loss and destruction of other goods and cargo in and on board of the said schooner, were compelled to pay and expend a further large sum, to wit, the sum of five hundred dollars, in order to discharge and release the said brig from the liens and charges therefor. And the said plaintiff further saith, that, in and about the defence, safe-

guard, and protection of the said brig as aforesaid, the said Frederick Sherwood and the said Abraham Sherwood did then and there necessarily pay, lay out, and expend a further large sum of money, to wit, the sum of two thousand dollars, for costs and necessary fees, expenses, and disbursements in and about the defence of the said action, and in and about the said appeal, and in and about the ascertaining of the amount of damages for which the said brig was liable as aforesaid, whereby the defendant, according to the terms of the said policy, and of its promise and undertaking, then and there became liable to pay, and ought to have paid, to the said plaintiff for the use of the said Frederick Sherwood and the said Abraham Sherwood, in proportion to their respective interests, the further sum of one thousand dollars, being the rateable part or proportion of the expenses last aforesaid, which the said defendant ought to have paid and contributed, in respect to the insurance aforesaid; of all which premises the defendant had notice, to wit, at the city of New York aforesaid.

And the said plaintiff further saith, that he produced and made to the defendant due proof of the afore mentioned collision, and of the said loss, and of the proceedings aforesaid, and of all and singular the premises; and he also produced and made to the defendant due proof of the interest of him, the said Frederick Sherwood and of the said Abraham Sherwood, in the said brig, her tackle, &c., according to the true intent and meaning of the said policy of insurance and the custom of merchants; and then and there, and also at the expiration of thirty days thereafter, he requested the defendant to pay to him, the said plaintiff, the amount of the said loss, and of the rateable share aforesaid, of the moneys necessarily paid out and expended as aforesaid, to wit, the sum of eight thousand dollars, according to the tenor and effect of the said policy and of the defendant's promise and undertaking aforesaid; but to pay the same, or any part thereof, the defendant has wholly neglected and refused.

2d count. And whereas, also, the said plaintiff heretofore, to wit, on the seventeenth day of October, in the year one thousand eight hundred and forty-three, at the city aforesaid, according to the usage and custom of merchants, caused to be made by the defendant a certain other policy of insurance, upon a certain other brig or vessel, called the Emily, for the same period of time, subscribed for the same sum, and upon the same subject-matter of insurance, upon and for the same premium, and upon the same terms and stipulations, and containing therein to the same effect as in the said policy of insurance in the said first count of this declaration is above mentioned, as by the said policy of insurance will more fully appear.

And the plaintiff further in fact saith, that the said policy of insurance was effected for the use and benefit of the said Frederick Sherwood and of Abraham Sherwood, citizens of the State of Connecticut, and to protect their respective shares and interest in the said brig; and he avers, that at the time of effecting the said policy, and continually afterwards, until and at the time of the loss and misfortune hereinafter

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mentioned, the said Frederick Sherwood was interested in and the owner of three-eighth parts of the said brig, and the said Abraham Sherwood was interested in and the owner of one other eighth part of the said brig; of which the defendant had notice, to wit, at the city of New York aforesaid.

And the said plaintiff further saith, that the said brig did not use any foreign port in the Gulf of Mexico, nor St. John river, in Florida, nor the West Indies, between the 25th July and the 5th of October, within the true intent and meaning of the said policy.

He further in fact saith, that afterwards, to wit, on the thirteenth day of March, in the year 1844, the said brig set sail and departed from Charleston, in the State of South Carolina, having on board a cargo of furs, corn, tobacco, cotton, rice, &c., bound for the port of New York; and that at the time of sailing from Charleston, as aforesaid, the said brig was stout, staunch and strong, had her cargo well and sufficiently stowed and secured, and was in good and proper sailing trim; was well masted, rigged, tackled, victualled, apparelled, and appointed; had on board a skilful and experienced master, skilful and experienced mates, and sufficient and competent mariners, and was in every respect fit for sea and the voyage she was about to undertake. And the plaintiff further in fact saith, that nothing material occurred on the said voyage until Tuesday, the nineteenth day of March aforesaid, (sea time,) which commenced with strong breezes and clear weather. At quarter past one o'clock, Barnegat light bore west about three miles; at two p. m., took in the studding-sails and top gallant-sails, and close reefed the foretop-sail, and double reefed the maintop-sail and hauled up the fore-sail; a heavy snow squall coming on, the wind, which before had been from south by west, hauled and came out from west northwest, and from thence to about northwest by west, being variable and squally. At four o'clock, p. m., they set the jib and double reefed foretop-sail and try-sail. At 40 minutes past five o'clock, p. m., a duly licensed pilot, appointed by the authorities of the State of New Jersey, for that purpose duly empowered and authorized by the laws of the said State, came on board the said brig, and, as such pilot, took the charge, command, and management thereof, and undertook to pilot and navigate the said brig into the port of New York. And the said plaintiff further saith, that by the orders of the said pilot they set the mainsail and jib, single reefed foretopsail, and whole maintopsail, the said brig heading up about north and north by east, the wind heading them off occasionally; that they stood on that course until the said pilot judged the brig to be up to the point of the Romer shoal, having before this taken in the mainsail and jib; that by orders of the pilot they tacked ship and stood in for the point of the hook, heading to the southward and westward, close hauled; that between the hours of seven and eight o'clock in the evening or night of the last mentioned day, the pilot ordered the brig to be put about; that an attempt was accordingly made to put the brig about, but she missstayed, whereupon the pilot gave orders to wear ship. And the plaintiff

further saith, that whilst the said brig Emily was being navigated as aforesaid on the high seas, to wit, at the city of New York, by and through the want of a proper look-out by the mate and crew of the said brig, occasioned by the failure of the brig to come round to the wind, her dangerous proximity to the shore, the entanglement of some of the remaining rigging which impeded her manœuvre, and the distraction which that circumstance *were* calculated to produce on the attention of the mate, and by and through the erroneous order of the said mate who was stationed on the top-gallant forecastle of the said brig, who saw the schooner hereinafter named, and who, in the confusion of the moment, cried out to the man at the wheel "helm hard down! luff!!" whereas, he ought not to have given any such order, and by and through the fault of the said brig Emily the said brig run into and against a schooner or vessel called the Virginian, and thereby damaged and injured the said schooner so that she then and there foundered and sunk, and was totally lost, together with a valuable cargo laden in and on board of the said schooner; and the said brig Emily, her tackle, &c., by the force of the said collision, became and was greatly damaged, to wit, to the value and amount of three hundred dollars, to wit, on the same day and year, and at the place last aforesaid, whereby the owners of the said brig became and were obliged to, and did, expend a large sum, to wit, the sum of three hundred dollars, in and about the repair of the said brig Emily; and whereby, also, the said last mentioned vessel became and was liable to make good, and pay to the owners of the said schooner, and of the said cargo in and on board of her, the damages sustained by the owners of the said schooner and her cargo by the said collision, which liability the said plaintiff avers then and there constituted, and was, a lien and specific charge and incumbrance upon the said brig Emily, her tackle, apparel, and furniture; of all which premises the said defendants had notice, to wit, on the same day and year last aforesaid, and at the city of New York aforesaid.

And the said brig, her tackle, &c., being so liable as aforesaid, the said plaintiff further saith, that in order to release and discharge the said brig from the operation of the said lien, he was compelled and obliged to pay, and did pay, lay out, and expend, as agent for the said Frederick Sherwood & Abraham Sherwood, respectively, a further large sum of money, to wit, the sum of eight thousand dollars, in satisfaction of the loss and damage to the owners of the said schooner, and to the owners of portions of her cargo, caused by the said collision, and for which the said brig was liable in rem, that is to say, to Benjamin W. Bedell, Elisha Bedell, and William Van Name, who were the owners of the said schooner at the time of the said collision, the sum of six thousand dollars in full satisfaction and discharge of their claim and lien on said brig for the loss of the said schooner, her tackle, &c.; to the Atlantic Mutual Insurance Company the sum of one thousand nine hundred and eighty dollars, with interest from the twenty-fourth day of March, one thousand eight hundred and forty-four, in satisfac-

tion and discharge of their claim and lien on the said brig for the destruction of three thousand nine hundred and fifty bushels of corn, laden in and on board of the said schooner at the time of the said collision, and which was thereby totally lost; to William D. Roberts, junior, the sum of one hundred and twenty-five dollars, *his* way of compromise, in full settlement for a quantity of copper, pewter, and composition, laden in and on board of the said schooner at the time of the said collision, and which was thereby totally lost; to Hobson Johns the sum of $350, by way of compromise, and in full settlement and discharge of his claim and lien on the said brig for the loss and destruction by the said collision of two parcels, to wit, one hundred and thirty-two boxes of tobacco, which were shipped on board of the said schooner and were totally lost; to Thomas G. Austen the sum of three hundred dollars, by way of compromise, and in full settlement and discharge of a claim and lien on the said brig for the loss and destruction of a quantity of furs laden on board the said schooner, and which were totally destroyed by the said collision and lost; to Henry Raymond the sum of fifty dollars, by way of compromise, in full settlement and satisfaction of a claim and lien on the said brig for the loss and destruction of a quantity of furs laden on board of the said schooner at the time of the said collision, and which were thereby totally destroyed; of all which premises the defendant had notice, to wit, the same day and year last aforesaid, and at the city aforesaid. And the plaintiff further saith, that after the said collision, and by reason and in consequence thereof, the said plaintiff, on behalf of the said Frederick Sherwood and the said Abraham Sherwood, for whose benefit the said insurance was made as aforesaid, afterwards, to wit, on, &c., did sue, endeavor, and labor to recover, discharge, and defend the said brig of and from the liens and encumbrances thereon, which the owners of the said schooner Virginian, and the shippers and owners of cargo laden on board of her, had by means of the said collision against the said brig, her tackle, &c., to wit, at the city of New York aforesaid. And the plaintiff, on behalf of the said Frederick and the said Abraham, did then and there necessarily expend a large sum of money in and about necessary costs, fees, charges, expenses, and disbursements of defending and protecting the said brig, to wit, the sum of two thousand dollars, whereby the defendant, according to the terms of the said policy, and of its promise and undertaking aforesaid, then and there became liable to pay, and it ought to have paid to the said plaintiff, for the use of the said Frederick Sherwood, and the said Abraham Sherwood, the further sum of one thousand dollars, being the rateable part or proportion of the expenses last aforesaid which the said defendant ought to have paid and contributed in respect to the insurance aforesaid; whereof the defendant had notice, to wit, on the same day and year last aforesaid, and at the city aforesaid.

And the plaintiff further saith, that he produced and made to the defendant proof of the aforementioned collision, and of the said loss, and the several payments aforesaid, and of the proceedings aforesaid,

and of all and singular the premises. And he also produced and made to the defendant proof of the interest of the said Frederick Sherwood and of the said Abraham Sherwood in the said brig, according to the true intent and meaning of the said policy of insurance and the custom of merchants; and then and there, and also at the expiration of thirty days thereafter, he requested the defendant to pay to him, the said plaintiff, the amount of the said loss, and of the rateable share of the moneys necessarily paid, laid out, and expended as aforesaid, to wit, the sum of eight thousand dollars; but to pay the same, or any part thereof, the defendant has wholly neglected and refused.

And also for that, whereas, the said defendant, on the eighteenth day of August, in the year of our Lord one thousand eight hundred and forty-seven, at New York, to wit, at the city and county aforesaid, was indebted to the said plaintiff in the sum of sixteen thousand dollars, lawful money of the United States of America, for so much money before that time lent and advanced by the said plaintiff to the said defendant, and at the special instance and request of the said defendant. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiff in the further sum of sixteen thousand dollars, like lawful money as aforesaid, for so much money before that time paid, laid out, and expended by the said plaintiff, to and for the use of the said defendant, and at the like special instance and request of the said defendant. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money last above mentioned when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiff in the further sum of sixteen thousand dollars, like lawful money as aforesaid, for money before that time had and received by the said defendant to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before

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that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting, the said defendant then and there was found to be in arrear, and indebted to the said plaintiff in the further sum of sixteen thousand dollars, like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested; nevertheless, the said defendant, (although often requested, &c.,) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff; but to pay the same, or any part thereof, to the said plaintiff, the said defendant has hitherto wholly refused, and still does refuse. to the damage of the said plaintiff of sixteen thousand dollars; and therefore the said plaintiff brings suit, &c.

E. H. OWEN, *Attorney.*

And the said the General Mutual Insurance Company, defendants in this suit, by Alexander Hamilton, jr., their attorney, come and defend the wrong and injury, when, &c., and say, that the said first count of the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendants, and that they, the said defendants, are not bound by law to answer the same. And for cause of demurrer the said defendants show, that it does not appear by the said first count of the said declaration that the said plaintiff has sustained any loss or damage by reason of peril, covered by or included in the policy set out in the said first count of the said declaration, and this they are ready to verify; wherefore, for want of a sufficient count of the said declaration in this behalf, the said defendants pray judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them, &c.

And the said the General Mutual Insurance Company, defendants, as to the second count of the said declaration say, that the said second count of the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendants, and that they, the said defendants, are not bound by law to answer the same; and for cause of demurrer, the said defendants show, that it does not appear by the said second count of the said declaration that the said plaintiff has sustained any loss or damage by reason of any peril, covered by or included in the policy set out in the said second count of said declaration, and this they are ready to verify; wherefore, for want of a sufficient second count of the said

declaration in this behalf, the said defendants pray judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them, &c.

And for a plea in this behalf to the third, fourth, fifth, and sixth counts of the said declaration, the said the General Mutual Insurance Company, defendants, come and defend the wrong and injury, when, &c., and say that they did not undertake or promise in manner or form as the said plaintiff in the third, fourth, fifth, and sixth counts of the said declaration hath above thereof complained against them, and of this they put themselves upon the country. And the said plaintiff likewise, &c.

And the said plaintiff saith, that the said first count of the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for him, the said plaintiff, to have and maintain his aforesaid action thereof against the said defendant, and the said plaintiff is ready to verify and prove the same as the court here shall direct and award; wherefore, inasmuch as the said defendant hath not answered the said first count of the said declaration, nor hitherto in any manner denied the same, the said plaintiff prays judgment and his damages by reason of the non-performance of the said several promises and undertakings in the said first count of the said declaration mentioned, to be adjudged to him, &c.

And the said plaintiff further saith, that the said second count of the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for him, the said plaintiff, to have and maintain his aforesaid action thereof against the said defendant, and the said plaintiff is ready to verify and prove the same as the court here shall direct and award; wherefore, inasmuch as the said defendant hath not answered the said second count of the said declaration, nor hitherto in any manner denied the same, the said plaintiff prays judgment and his damages by reason of the non-performance of the said several promises and undertakings in the said second count of the said declaration mentioned to be adjudged to him, &c.

But, because the court no where are *not* yet advised what judgment to give of and upon the premises whereof the said parties have put themselves upon the judgment of the court, a day is given to the parties aforesaid, before the judges of this court, at the City Hall, in and for the southern district of New York, on the first Monday of April next, to hear judgment thereon, for that the said court now here before the aforesaid judges thereof are not yet advised thereof, &c.

And it is further ordered by the said court, that the said issue above joined between the said parties to be tried by the country, be tried at the circuit court appointed to be held at the City Hall, in the city of New York, in and for the southern district of New York, on the first Monday of April next.

And now at this day, that is to say, on the first Monday of April, in

the year 1848, before the judges aforesaid, at the City Hall, in the city of New York aforesaid, come as well the said plaintiff as the said defendant, by their respective attorneys aforesaid; and hereupon all and singular the premises aforesaid, whereon the said parties have put themselves upon the judgment of the court, being seen, and by the court now here fully understood, and mature deliberation being thereupon had, it appears to the said court here that the first and second count of the declaration aforesaid, and the matters therein contained, are sufficient in law for the said plaintiff to have and maintain his aforesaid action against the said defendant; wherefore the said plaintiff ought to recover against the said defendant his damages by reason of the premises in the said first and second count of the said declaration mentioned.

But, because it is not known to the court here what damages the said plaintiff has sustained by reason thereof, and because it is convenient and necessary that there be but one assessment of damages in this suit, therefore let the giving of judgment in this behalf against the said defendant be stayed until the said issue above joined between the parties whereon the said parties have put themselves upon the country shall have been tried and determined; and because the said issue above joined between the said parties, to be tried by the country, was not tried at the said circuit court held at the time and place therein before mentioned, therefore the process thereof between the parties aforesaid is continued until the circuit court appointed to be held at the City Hall, in the southern district of New York aforesaid, on the first Monday of October next.

And it is further ordered, that the jury who shall try the said issue also inquire of, and assess, the damages which the said plaintiff has sustained by occasion of the premises whereon the said parties have put themselves upon the judgment of the said court.

At which day and place last aforesaid, before the circuit judge aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury summoned to try the said issue, and to assess the said damages, being called, did not appear, but made default; wherefore it is ordered, that the process thereof between the parties aforesaid be continued until the next circuit court, to be held at the City Hall, in and for the southern district aforesaid, on the first Monday of April, in the year 1849.

At which day and place last aforesaid, before the honorable Samuel Nelson, one of the circuit judges of the United States, according to the form of the statute in such case made and provided, come as well the above named plaintiff, by his attorney aforesaid, as the said defendant, by his attorney aforesaid, and the jurors of the jury summoned to try the said issue, and to assess the said damages, being called, also come, who, to speak the truth of the matters aforesaid, being chosen, tried, and sworn, say, upon their oath, as to the issue above joined between the parties to be tried by the country, that the said defendant did undertake and promise, in manner and form as the said plaintiff in the

third and subsequent counts of his declaration has above complained against him, and they assess the damages, by reason of the non-performance of the said promises and undertaking in the said plaintiff's declaration mentioned, over and above his costs and charges by him about his suit in this behalf expended, to four thousand five hundred and twenty-six dollars and thirty-four cents, and for those costs and charges to six cents.

And because the said court now here are not yet advised what judgment to give of and upon the premises, the process thereof is continued between the parties aforesaid, of the place aforesaid, before the judge aforesaid, until the fourth day of June, as yet in the term of April, in the year last aforesaid, at the place aforesaid; and the same day is given to the parties aforesaid, at the same place, to hear judgment of the said court thereupon.

At which said last mentioned day, before the judges of the said circuit court, come as well the said plaintiff as the said defendant, by their respective attorneys aforesaid; and thereupon, all and singular the matters being understood, and mature deliberation being thereupon had, it is therefore considered that the said plaintiff do recover against the said defendant his said damages, costs, and charges by the jurors aforesaid, in form aforesaid assessed, and also one hundred and sixty-seven dollars and sixty-one cents for his costs and charges, by the said court now here adjudged of increase to the said plaintiff, or with his assent; which said damages, costs, and charges, in the whole, amount to four thousand seven hundred and thirty-nine dollars and seventy-seven cents; and the said defendant, in mercy, &c.

Judgment signed this 5th June, A. D. 1849.

RICHARD E. STILWELL,
Deputy clerk.

CIRCUIT COURT UNITED STATES.

EBENEZER B. SHERWOOD
vs.
The GENERAL MUTUAL INSURANCE COMPANY.

Bill of exceptions annexed to the record, and forming part thereof.

Afterwards, at the April term of the said circuit court, held at the City Hall of the city of New York, the said issues came on to be tried on the fourteenth day of April, 1849, before the honorable Samuel Nelson, one of the judges of the said court, and a jury for that purpose duly empannelled, tried, and sworn; at which day and place came as well the said plaintiff, by his attorney aforesaid, as the defendants, by their attorney aforesaid; and thereupon the plaintiff, to maintain and prove the said issues on his part, introduced evidence and admissions proving, or tending to prove, the following facts and circumstances:

It was admitted that the defendants had subscribed and delivered to the plaintiff a policy of insurance in the form, and containing the conditions and agreements, as set forth in said declaration.

The brig Emily in said policy mentioned, and all interest in her, until and at the time of the loss, claimed, was owned by, and vested in, the persons for that purpose named in the declaration, and the said policy was effected for their account and benefit.

The collision occurred, as stated in said declaration, and from the causes and circumstances therein mentioned, and the plaintiff further proved the other matters set forth and contained in the declaration.

It was also further proved, on the part of the plaintiff, that the libel was filed by the owners of the schooner Virginian against the brig Emily, her tackle, &c., on the 26th March, 1844, in the United States district court, for the southern district of New York. In this case the plaintiff interposed a claim, and filed his answer to the libel on the 13th April, 1844; proofs were taken in the cause, and on the hearing a decree was pronounced in favor of the libellants, as stated in the pleadings in this suit. From the final decree of the district court an appeal was taken to the circuit court, which, after argument of the appeal, affirmed the decree below, as is also stated in the pleadings.

After the commencement of the suit in the district court, a notice, dated the 17th September, 1844, was, on or about the same day, given to the defendants, the General Mutual Insurance Company, in substance as stated in the pleadings, to which the said defendants replied, denying their liability, on the ground that the loss, if any, had occurred by the fault of the assured, and was not covered by the policy.

After the decree in the district court, a further notice was given by the plaintiff to the defendants, together with the documents and papers in that behalf mentioned in the declaration; to which the defendants replied, denying that the loss, as claimed, was covered by the policy.

After the decree in the circuit court, a further notice was given of that decree by the plaintiff to the defendants, and the question, whether an appeal to the Supreme Court of the United States should be taken, was submitted to the defendants, with an offer on the part of the plaintiff to co-operate in the appeal; being the notice in that behalf mentioned in the declaration.

To this letter the defendants replied as before, declining to act in the premises.

The plaintiffs' counsel then recommended his clients, the parties claimants in that suit, to settle and compromise the claims against the brig Emily on the best terms they could.

On the 22d April, 1847, a compromise was effected with the owners of the schooner Virginian, by agreeing to pay them $5,850, in full of the decree and interest, each party paying their own costs; this was considerably less than principal and interest on the decree. This amount was paid to the owners of the schooner, and a release was taken.

A libel was also filed by Thomas J. Austin, as administrator of Gustavus Austin, jr., claiming against the brig Emily the value of an invoice of goods, alleged to have been shipped on board the Virginian, and lost in her by the collision. This libel was filed after the above

decision in the district court. The claim was about $3,000. This claim was compromised, by advice of plaintiffs' counsel, by paying $300, together with $44 45, the amount of libellant's costs. On 13th May, 1847, this amount was paid, and a release taken.

There was also a claim, by Hobson Johns, of Virginia, against the brig Emily and her owners, for loss by the collision of two invoices of tobacco, valued at $1,108, who threatened to file a libel for the loss of these two invoices. Plaintiffs' counsel advised the owners to settle this demand. On the 17th June, 1847, the owners settled it, by paying $350 in full of the whole claim.

Henry Raymond, of this city, presented a claim against the brig Emily, for furs shipped on board the Virginian and lost by the collision; the claim was $99 23. By advice of plaintiffs' counsel this claim was settled on the 21st May, 1847, by paying $50 in full of all demands.

William D. Roberts, jr., of Norfolk, Virginia, presented a demand for $269 75 against the brig Emily; value of an invoice of copper shipped in the Virginian. Mr. Benjamin D. Silliman was employed as counsel to libel the Emily. By advice of plaintiffs' counsel, on the 21st October, 1847, the owners of the Emily settled the demand by paying $125 in full satisfaction and release of all claims.

The brig Emily herself was alleged to have been injured by the collision, and bills for repairs—one from Whitlock & Berrian, amounting to $124 79; one from William Downs, amounting to $31 05; and one from William Gavey, painter, for $8 00—were paid. These three bills amount to $163 84.

The following are the costs, counsel fees, and clerk's costs, paid by the owners of brig Emily, for defending the suit brought by Bedell and others in the district court, and on the appeal to the circuit court:

In the district court, advocate's counsel fees, including fees upon reference before clerk	$200 00
Taxable costs	232 22
Com'rs and clerk's costs	159 92
Additional clerk's bill	18 73
	$610 87

In the circuit court, on appeal—	
Counsel fees for advocate	$250 00
Taxable costs	111 65
Clerk's bill	70 43
	$432 08

The aggregate of all costs, counsel fees, and clerk's costs, is $1,042 95.

Adding interest upon these sums from the time they were paid, and adding interest upon costs and counsel fees, from the 1st of January, 1847, the aggregate is $9,072 68.

Of which the defendants are liable for one half, or the sum of $4,536 34.

The evidence being closed, the defendant's counsel requested the court to instruct the jury, as follows:

1st. That the general objection to the recovery of the plaintiff was, that [it] is apparent on the face of the declaration, that the loss claimed was not occasioned by a peril insured against, but was to be attributed solely to the gross negligence of the agents of the assured; and therefore that the loss was either an exception from the terms of the policy, or was not covered by them at all.

2d. That the rule "causa proxima non remota spectatur," in its proper application, relieves the defendants from all liability; since the proximate cause here was, according to the decree of the district and circuit court, "the fault of the Emily." The collision by itself did not create the liability to pay. The want of care, skill, and vigilance on the part of the master and crew of the Emily were to be superadded to the collision.

3d. That if the negligence and fault of the assured, and not the collision, were the proximate cause of the loss, such fault and negligence in this case, (without which the decree would not have been made,) should certainly excuse the underwriters.

4th. That even if the insurer is liable for the amount of the claim against the Emily for the loss of schooner, it does not follow that he is also liable for the loss of the cargo on board the schooner Virginian. No case has yet carried the liability of the underwriter to this extent.

5th. That the cost of defending the suits are not chargeable upon the underwriters.

6th. That the counsel fees to the advocate are clearly inadmissible.

Whereupon his honor, the judge, charged the jury: It appeared from the evidence that the brig Emily sailed from Charleston, for New York, on the thirteenth day of March, in the year 1841, with a cargo of cotton and other merchandise; that on the afternoon of the 18th day of March aforesaid, being near Barnegat, she took aboard a licensed pilot, and proceeded towards New York, the wind being boisterous and blowing in flaws; that between 7 and 8 o'clock in the evening she stood over for the Romer shoals, close hauled on a wind, heading for Sandy Hook. Finding that the brig could not fetch in to the hook upon that tack, and having run as close to the beach as he deemed prudent, the pilot gave orders to tack ship; in consequence of the maintopsail brace being slacked the vessel did not go about, and orders were then given by the pilot to wear ship, and whilst in the act of wearing the mate of the Emily discovered a sail close by, which proved to be the schooner Virginian, bound for New York, with a cargo on board; the mate cried out, sail ahead! but almost immediately thereafter the brig struck the schooner and sunk her with her cargo. The owners of the schooner Virginian filed their libel in the district court of the United States, for the southern district of New York, before referred to against the brig Emily, alleging that the collision was occasioned by the fault and mis-

management of those having charge of the Emily. An answer was filed by the owners of the latter denying that the collision was properly attributable to the Emily; and on the contrary, alleging that it was occasioned by the fault and unskilfulness of those on board of the schooner; proofs were taken in the district court, and the cause having been heard upon the pleadings and proofs, an interlocutory decree was pronounced therein on the twenty-second day of April, in the year 1845, whereby, after reciting that it appeared to the court that the said collision and the damages and loss incurred by the libellant in consequence thereof occurred by the negligence or fault of the said brig Emily, it was considered that the libellants were entitled to recover the damages by them sustained thereby; and by which decree a reference was ordered to ascertain the value of the said schooner Virginian, her tackle, &c., at the time of the collision and of the cargo then on board of her belonging to the libellants, and the amount of the loss in the premises sustained by the libellants by means of such collision; and afterwards, the said cause having again been heard upon exceptions to the report, and the proofs and allegations of the respective parties, a final decree was pronounced thereon on the seventh day of June, in the year 1845, whereby it was ordered, adjudged, and decreed, by the said district court, that the libellants recover in the said action their damages, by means of the premises, the sum of five thousand two hundred and fifty-four dollars and seventy cents, together with their costs to be taxed; and that the said brig, her tackle and apparel, be condemned for satisfaction thereof, which said costs of the libellants were afterwards duly taxed at $704 96. From this decree an appeal was taken by the owners of the brig Emily to the circuit court of the United States, for the southern district of New York, in the second circuit, and after hearing the proofs, and the arguments of counsel, the court affirmed the decree of the district court, with the costs of the respondents to be taxed. After the decision of this court had been pronounced, another libel was filed by the owners of a portion of the cargo lost on board the Virginian, against the brig Emily, and claims were made and libels threatened by others of the shippers of the cargo lost on board of the schooner, against the owners of the Emily, which action and claims by the owners of the said cargo were compromised and settled by the owners of the Emily. That if they should find upon the evidence that, at the time of sailing from Charleston the brig Emily was a seaworthy vessel, properly equipped for the voyage to New York, and that she had on board a skilful master, and a sufficient and competent crew, the defendants are liable upon the policy given in evidence for the one-half of the loss to the brig Emily, arising from the collision with the schooner Virginian, not exceeding the sum insured, notwithstanding that it was occasioned by, or resulted from, the fault of the pilot, or of the master and crew of the brig, either from want of keeping a sufficient look-out or from mismanagement of the vessel.

The direct and immediate consequence of the collision was that a lien was created on the brig, in favor of the owners of the Virginian,

and of the owners of the cargo on board of her, to the extent of the value of the schooner, and of the cargo that was destroyed by the disaster, and the plaintiff is entitled to recover from the underwriters, not only the cost of the actual repairs of the injury done to the brig, but also the several sums that her owners have actually and in good faith paid to the owners of the schooner, and of the cargo lost with her, in order to discharge their vessel from the liens created by the said collision; that the plaintiff is also entitled to recover from the underwriters on the brig the actual expenses and costs, including reasonable advocates' fees, necessarily incurred in the defence of the brig from the aforesaid claim.

The policy of insurance in this case is subscribed for $8,000, the vessel being valued therein at $16,000; it was therefore an insurance upon one-half of the vessel, and the defendants are consequently liable for one-half only of the loss and damage sustained by the assured in consequence of the said collision, which the jury shall find, upon the evidence, was actually and properly paid by the owners of the Emily in order to relieve their vessel.

The counsel for the defendant then and there excepted to said charge, so far as the same differed from, or did not conform to, the instructions prayed for by him, as above.

The jury thereupon rendered a verdict for the plaintiff for four thousand five hundred and thirty-six dollars and thirty-four cents damages, and six cents costs.

And because the said several matters so offered and given in evidence, and insisted upon by the defendants aforesaid, and the charge of the said judge, and the said exceptions taken to the same do not appear by the record of the verdict aforesaid, the said defendants have caused the same to be written on this bill of exceptions, to be annexed to such record, and have prayed the said judge to set his hand and seal to the same. Whereupon the hon. Samuel Nelson, the associate justice before whom the said issues were tried, and said exceptions taken, and one of the judges of said circuit court, hath hereto set his hand and seal, this twenty-eighth day of November, in the year of our Lord one thousand eight hundred and fifty-one.

S. NELSON. [L. S.]